DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
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DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS Petitioner, v. XUYEN THI VU Respondent.	Case No.: CR-C-07-100082 (ALJ Goode)

FINAL ORDER

On May 31, 2007, the Government denied Respondent's application for a Basic Business License ("BBL"), because she allegedly had violated the "Clean Hands" certification in her application by failing to disclose that she owed the Government $18,000 in fines and penalties for violations of the Civil Infractions Act (D.C. Code, 2001 Ed. §§ 2-1802.01(a)). *See* the May 31, 2007, Notice to Deny Basic Business License ("Notice"). On June 6, 2007, Respondent filed an appeal to challenge the denial of her application. At a status conference on October 25, 2007, the Government could not identify any specific Notices of Infraction ("NOIs") that were issued and served on Respondent that were outstanding and for which Respondent was liable for fines and penalties.

The Government was ordered to file "a complete and comprehensive statement of the factual basis for the denial of Respondent's application for a Basic Business License" no later than November 9, 2007. *See* October 26, 2007, Scheduling Order, page 2. On November 9, 2007, the Government complied with Order and indicated that there were four outstanding NOIs; however, the Government acknowledged that liability had not attached to Respondent for any of

the four NOIs. A status conference in this matter was held on November 15, 2007. Respondent Xuyen Thi Vu, with her attorney Ronald Webne, Esq., was present, as was Charles Thomas, Esq., on behalf of the Government. Based on the Government's November 9, 2007, Response ("Government's Response"), Respondent moved orally for summary adjudication of the matter. OAH Rule 2828. Counsel for the Government candidly conceded that there was no genuine issue of any material fact concerning this case, and offered no argument in opposition to Respondent's motion.

Based on the Government's Response, argument of counsel for both parties, and the entire record herein, I make the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

The following facts are not in dispute:

1. On or about January 29, 2007, Respondent filed an application for a Class A Vendor's BBL. On May 22, 2007, the Government issued a "Notice to Deny [Respondent's] Basic Business License [Application]." *See* Government's Response, exhibit 1.

2. The BBL application denial was predicated solely on Respondent's alleged violation of the "Clean Hands Self Certification," by her purported failure to acknowledge approximately $18,000 in outstanding fines and penalties authorized under the Civil Infractions Act. D.C. Code, 2001 Ed. §§ 2-1801.01, *et seq*. Specifically, the Government relied on four Notices of Infraction ("NOI") – S100358, S700583, P100023, and P100032. Government's Response, pages 1 and 2.

3. On September 26, 2007, NOI **S100358** was dismissed without prejudice, as Respondent had never been served with the NOI. Government's Response, page 1.

4. On October 16, 2007, a Notice of Default was issued for NOI **S700583**. *Id*. It appears from the record that the Government never served the NOI on Respondent.

5. On September 5, 2006, NOI **P100023** was dismissed without prejudice as Respondent had never been served with the NOI. *Id*.

6. On September 8, 2005, NOI **P100032** was dismissed without prejudice as Respondent had never been served with the NOI. *Id*.

III. CONCLUSIONS OF LAW

Respondent argues that she is entitled to judgment as a matter of law, because the above-referenced facts were derived from documents submitted by the Government and the Government conceded the accuracy of these facts. The Government acknowledged that it did not have an argument in opposition to Respondent's contention; however, the Government asked for the evidentiary hearing to be scheduled at a later date so that its witness(es) could testify regarding bases for the denial of Respondent's BBL application that were not included in the Notice.

The Rules of this administrative court authorize motions for summary adjudication or comparable relief. OAH Rules 2812 and 2828. The Rules also state that "[w]here a procedural issue coming before this administrative court is not specifically addressed in these Rules, this administrative court may rely upon the District of Columbia Superior Court Rules of Civil Procedure as persuasive authority." OAH Rule 2801.2. A motion for summary judgment "shall

be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Super. Ct. Civ. R. 56 (c).

Moreover,

> there shall be served and filed with each motion for summary judgment … a statement of the material facts numbered by paragraphs as to which the moving party contends there is no genuine issue …. In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion.

Super. Ct. Civ. R. 12-I (k). Therefore, in ruling on a motion for summary judgment,

> [t]he focus of [the court's] inquiry is twofold: first, we look to see if the moving party has met its burden of proving that no material fact remains in dispute, and then we also must determine whether the party opposing the motion has offered competent evidence admissible at trial showing that there is a genuine issue as to a material fact. The burden on the nonmoving party is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.

Sanchez v. Magafan, 892 A. 2d 1130, 1132 (D.C. 2006) (citation omitted). Accordingly, the first inquiry for this administrative court is whether there is no genuine issue as to any material fact. In addressing this issue, the court is required to view the record in the light most favorable to the non-moving party. *Settles v. Redstone Dev. Corp.*, 797 A.2d 692, 694 (D.C. 2002).

The Notice denying Respondent's application for a BBL rested solely upon the Government's determination that Respondent allegedly had violated the "Clean Hands" certification in her application. D.C. Code, 2001 Ed. § 47-2863(a)(2). The law prohibits the Government from issuing a BBL to any "applicant for a license or permit if the applicant:

> (1) Owes the District more than $ 100 in outstanding fines, penalties, or interest assessed pursuant to the following acts or any regulations promulgated under the authority of the following acts, the:
>
> * * *
>
> (D) Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, effective October 5, 1985 (D.C. Law 6-42; *D.C. Code § 2-1801.01* et seq.) . . . ."

D.C. Code, 2001 Ed. § 47-2862.

The governing statute also sets forth penalties for any applicant found to have knowingly violated the Cleans Hands certification. D.C. Code, 2001 Ed. § 47-2864. Specifically, the law mandates that the District government shall "[p]roceed immediately to revoke each license or permit, the application for which contains such a falsified certification." D.C. Code, 2001 Ed. § 47-2864. However, the law notes, in essence, that the Government may not revoke (or deny) a license if violations of the Civil Infractions Act are the basis for the denial and liability for the civil infractions has not yet attached to the applicant. D.C. Code, 2001 Ed. § 47-2862(b). The Civil Infractions Act establishes that liability does not attach to a respondent until the Mayor has served a notice of infraction on respondent, and an Administrative Law Judge has issued a Final Order finding the respondent liable, unless the respondent admits the violation. D.C. Code, 2001 Ed. §§ 2-1802.01(a) and 2-1802.04.[1]

During the status conference on November 15, 2007, counsel for the Government acknowledged that the factual predicate for the Notice had been completely undermined by the Government's Response. Specifically, the Government's Response established that there were four outstanding NOIs for which liability allegedly had attached to Respondent and that the fines

[1] In the absence of service, Respondent has never had an opportunity to admit to the alleged violations.

associated with these NOIs, including penalties, totaled $18,000. However, at the time the Notice was issued (May 31, 2007), the Government knew that two (P100023 and P100032) of the four NOIs had already been dismissed without prejudice as Respondent had never been served with the NOIs. Government's November 9, 2007, Response, page 2. Furthermore, as of May 31, 2007, the Government knew that Respondent had not been adjudged liable for the other two NOIs (S100358 and S700583). In fact, as Respondent had not been served with the NOI, ultimately S100358 was also dismissed without prejudice on September 26, 2007. Additionally, on October 16, 2007, this administrative court issued a Notice of Default on S700583; however, this preliminary Notice (which also probably stems from a lack of service), is not a Final Order concluding that Respondent is liable for the NOI. D.C. Code, 2001 Ed. § 2-1802.04.

Moreover, even if the Government's handling of this case was the classic "the right hand does not know what the left hand is doing," bureaucratic phenomenon, by November 9, 2007 (when the Government's Response was filed), the Business and Professional Licensing Administration ("BPLA") was informed that for the reasons stated, these NOIs could not support the denial of Respondent's BBL application. However, and most troubling, rather than acknowledge the mistake, the BPLA sought to have an evidentiary hearing so that its employees could testify regarding alleged wrong-doing on Respondent's part that was not articulated in the Notice and for which Respondent has never been given notice.

The regulations governing BPLA and the denial of BBL applications state that if the Government decides to deny an application, "[n]otice of the denial or suspension or revocation shall be given in writing, setting forth specifically the grounds therefor [sic]. . . ." 24 DCMR 509.4 (emphasis added). Additionally, it has been long established by courts around the country that a Government agency seeking to take enforcement action must give the affected party notice

of proposed action and an opportunity to defend its interests. *See Jones v. Flowers*, 547 U.S. 220 (2006); *Dusenberry v. United States*, 534 U.S. 161, 167-171 (2002); *Mennonite Bd. Of Missions v. Adams*, 462 U.S. 791, 800 (1983); *McCaskill v. District of Columbia Dep't of Employment Servs.*, 572 A.2d 443, 445 (D.C. 1990); *Carroll v. District of Columbia Dep't of Employment Servs.*, 487 A.2d 622, 624 (D.C. 1985). Thus, the basis upon which BPLA believed it was appropriate to present evidence to justify denial on Respondent's BBL for reasons that Respondent has never been given notice eludes this administrative court.

Therefore, when the record is viewed in a light most favorable to the Government (the non-moving party), I am still forced to conclude that there is no genuine issue of material fact in this case. The parties agree that the purported factual predicate for denial of Respondent's BBL does not exist. Consequently, Respondent is entitled to judgment as a matter of law.

The situation in this case is comparable to that in *Paschall v. District of Columbia Dep't of Health,* 871 A.2d 463 (D.C. 2005). The statute in that case – the Nursing Home and Community Residence Facility Residents' Protection Act of 1985, D.C. Code, 2001 Ed. § 44-1001.01 *et seq.* – regulates the discharge of patients from nursing homes. Like the regulatory scheme at issue here, it requires advance notice for enforcement action, establishes permissible grounds for a enforcement action, and provides for an administrative hearing at which an aggrieved party can challenge the enforcement decision.

In *Paschall,* a covered facility had discharged a resident without giving the required advance notice, and he therefore could not request a hearing before the discharge occurred. 871 A.2d at 465. The statute contains an express right of action for a resident to seek an injunction from Superior Court against a facility that violates the statute, D.C. Code, 2001 Ed. §

44-1004.01, but contains no express authority for an Administrative Law Judge to order the readmission of a resident who has been discharged without advance notice. Despite the absence of such express authority, the Court of Appeals in *Paschall* concluded that there was a "strong case for concluding that the Act implicitly authorizes an ALJ to order the remedy of readmission." 871 A.2d at 469.

On this record, I have authority to order the Government to issue Respondent a license, even though the governing statute does not explicitly vest that authority in this administrative court. The regulations governing BBL applications require that "[n]ot later than forty-five (45) days after filing a completed application for a vending business license, the applicant shall be notified by the Mayor of the Mayor's decision on the issuance or denial of the license." 24 DCMR 505.1 (emphasis added). Thus, the Mayor has an affirmative obligation to act on an application within 45 days after submission of a completed application. Additionally, as noted above, if BPLA is denying an application, "[n]otice of the denial or suspension or revocation shall be given in writing, setting forth specifically the grounds therefor [sic] . . . ." 24 DCMR 509.4 (emphasis added).

In this case, the Government's time to act has expired and BPLA has issued a notice of denial that constitutes its one opportunity to set forth all grounds for denial of Respondent's BBL application.[2] Given my findings of fact and conclusions of law concerning BPLA's denial of Respondent's application for a Class A Vendor's License, there is no lawful basis on this record to deny Respondent's license. As I clearly have authority to invalidate the Notice, the concomitant authority to order the Government to comply with the governing regulatory scheme

[2] This decision has no bearing on any post-issuance enforcement action that the Government may take against Respondent for newly discovered statutory or regulatory violations, if any.

is implicitly authorized. The Government must now comply with the governing regulatory scheme and grant Respondent a license. *See also Hamilton-El v. CCNV*, Case no. HS-P-07-200278 (OAH 2007); *DCRA v. Kiev Pawn*, Case No. CR-B-06-800043 (OAH 2006).

Therefore, based upon the entire record in this matter, it is, this 20th day of November 2007

ORDERED that Respondent's motion for summary judgment is **GRANTED**; it is further

ORDERED that the Government's May 31, 2007, Notice to deny Respondent's application for a Basic Business License is hereby **INVALIDATED**; it is further

ORDERED that no later than close of business, November 23, 2007, the Government shall issue to Respondent a Class A Vendor's License; it is further

ORDERED that the appeal rights of persons aggrieved by this order are set forth below.

November 20, 2007

/SS/
Jesse P. Goode
Administrative Law Judge